Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

KURT M. SCHNEIDER,

Petitioner,

versus

GEORGE A. HORMEL & CO., ALAN RASELL, AND HORMEL FOODS CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Must a plaintiff asserting a claim under the Age Discrimination in Employment Act prove "*both* that the reason given by the defendant . . . for discharging him is false *and* that the true reason he was selected for discharge is due to age discrimination," or is the finder of fact entitled to find in the plaintiff's favor upon substantial proof of a *prima facie* case plus evidence that the employer's proffered reasons for discharge are pretextual?

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Supreme Court Rule 29.6, Kurt M. Schneider respectfully suggests that the following individuals are parties to this suit or are corporate subsidiaries of parties to the suit:

1) Kurt M. Schneider

2) Hormel Foods Corporation

3) Alan Rasell

4) George A. Hormel & Co.

5) Campofrido Alimentacion, C.A.

6) Pozmeat

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Petitioner, Kurt M. Schneider, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 26, 1997.

OPINIONS BELOW

The District Court opinion, entering judgment against Kurt Schneider based on the jury verdict in this case and denying his *Motion for Judgment as a Matter of Law*, is unreported. See App. 3-6. The *per curiam* opinion of the Fifth Circuit Court of Appeals, affirming the District Court dismissal of Schneider's claims, is likewise unreported. *See* App. 1-2.

STATEMENT OF JURISDICTION

This claim for damages for age discrimination was removed from the Louisiana State Court pursuant to both 28 U.S.C. 1331 and 28 U.S.C. 1332. After a subsequent jury trial resulted in a finding of no liability on the part of the defendants, the District Court entered a judgment on February 14, 1996 dismissing Plaintiff's claims and ordering him to pay the costs of trial. Plaintiff received an extension of time in which to file a notice of appeal and timely noticed his appeal on May 17, 1996. Pursuant to

the appellate jurisdiction granted by 28 U.S.C. 1291, the Fifth Circuit Court of Appeals entered a *per curiam* judgment affirming the district court dismissal on August 26, 1997. This Court now has jurisdiction over this case pursuant to 28 U.S.C. 1254.

STATUTES INVOLVED IN THIS CASE

42 U.S.C. 1981

(a) All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

29 U.S.C. 623(a)

It shall be unlawful for an employer –

(1) to fail or to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or would otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

Proceedings Below

Petitioner, Kurt M. Schneider, filed this employment age discrimination suit in the Louisiana 34th Judicial District Court on March 3, 1993. His petition alleged that defendants had willfully discriminated against him on the basis of his age, in violation of Louisiana and federal anti-employment discrimination laws. On April 16, 1996, Defendants removed the case to the United States District Court for the Eastern District of Louisiana, alleging both federal question and diversity of citizenship jurisdiction.

The trial of this matter began on October 30, 1995. Despite overwhelming evidence of pretextual reasons given for the discharge, the jury found that Schneider did not meet the burden of proof on which it was instructed, see *infra*, presumably because he did not introduce direct

proof that the reason for his discharge was discrimination. The district court entered a Judgment for the Defendants on November 15, 1995.

Schneider timely appealed the judgment. On August 26, 1997, the Fifth Circuit issued a *per curiam* opinion, finding no reversible error in the district court proceedings. Its one paragraph reasoning concluded that, while "the charge could have been more specific in specifying that the jury could infer a discriminatory motive from a finding of pretext," it did not indicate "that the jury was prohibited from drawing that inference."

Background Facts

In 1972, Schneider began working at Hormel Foods in New Orleans as a relief sales representative. From this entry-level position, Schneider worked his way up the ladder until he received his own food service territory in the metropolitan New Orleans area.

Schneider met with a great deal of success in "selling distributors on Hormel products then working with the reps who represent those companies and then get the end user, operator, or whatever term you want to use, they have an end user utilize Hormel over someone else." Schneider garnered over forty awards, bonuses, and other recognition during his time at Hormel, as late as 1989 being recognized as "Second Quarter Employee of the Quarter" and receiving in 1990 the "Hormel Masters (Cure 81 Ham) Award." Schneider also hustled a great deal of hotel and entertainment business for Hormel, leading his supervisor to offer him a larger territory in San Diego in 1989.

In 1990, Hormel reorganized its management structure. The subsequent reorganization brought a new boss for the Memphis area, Alan Rasell. Shortly after Rasell came on board, odd things began to happen to the two oldest workers in Rasell's division. Both Twyla Kennedy and Kurt Schneider – the two oldest workers in the Memphis division and two of the top producers – began receiving scathing evaluations, became barraged with memoranda touting their poor performance, and received ultimata from management to either produce unprecedented sales numbers or suffer termination. Twyla Kennedy's performance remained consistent throughout her years at Hormel, yet she involuntarily resigned from the company.

Ultimately, Rasell engineered Schneider's departure from Hormel as well. He began his strategy of forcing Schneider's termination by yanking Schneider's best account, Arrow-Sysco, from his responsibility. Although the account manager for Arrow hesitated at the thought of the change, Hormel replaced Schneider as Arrow-Sysco's salesman with twenty-one year old Mike Reed. Despite this replacement of responsibility and in spite of corporate decisions which took away several of Schneider's other accounts, Schneider's numbers still rose 14% in 1990 and 26% in 1991.

Despite Mr. Schneider's continued positive performance, Alan Rasell continued to harass Schneider. He constantly shifted his focus, first asking Mr. Schneider to improve his administrative organization; when Schneider improved his organization, Rasell would say that he

focused too much on less important things like administration. Schneider's work habits were exemplary; testimony at trial indicated that he worked an average of ten hours per day. Although Mr. Schneider's sales data increased during the years prior to his termination and he ranked above other, younger sales associates, Rasell and his superiors found those numbers less than desirable.

Matters came to a head in mid-1991. On July 16, Alan Rasell sent Mr. Schneider a letter detailing a series of goals which he had to either meet or be terminated. The goals were:

1) Initiate a work-with plan with Arrow-Sysco including one work-with per week;

2) Schedule at least one Sysco District Sales Meeting for each district and attend four of these meetings;

3) Place two new items in Sysco and Christiana;

4) Make a formal deli presentation to Arrow-Sysco;

5) Make a product presentation to L. Frank & Co.'s Lubbock management;

6) Make 17 operator calls per week with a 20% or greater sales rate; and

7) Return all required paperwork to Rasell within an allotted time.

Not only did Rasell set these virtually unattainable goals concerning distributors which had been transferred from Schneider's responsibility, he also pestered Schneider with letters giving his subjective opinion on the nature of

his fulfillment of those goals. Schneider attained five of these seven virtually impossible goals. He nonetheless was terminated on August 4, 1992.

Kennedy and Schneider are the only two cases of involuntary termination in the Memphis Food Services Division in the years surrounding the trial. Figures indicated that Kurt Schneider and Twyla Kennedy had posted higher sales than several of their younger counterparts, yet only they suffered the axe. Based on this pattern of events and on the ill-treatment he had received during his later years at Hormel, Schneider concluded that his termination had been the product of age discrimination.

The Challenged Instructions

At the trial of this case, the District Court gave the following instruction concerning the burden of proof Schneider had to satisfy to prevail in this Age Discrimination and Employment Act ("ADEA") case. Initially, the Court instructed the jury that Schneider had four specific elements of proof:

1) That he was above the age of 40;

2) That he was discharged;

3) That he was qualified for the position;

4) That his age was a determinative factor in the defendants' decision to discharge him.

See App. 7. The District Judge further instructed the jury that Hormel could only be found liable for age discrimination where Schneider proved:

> *both* that the reason given by the defendant . . . for discharging him is false *and* that the

> true reason he was selected for discharge is due to age discrimination; that the defendant discharged him because of his age or regarded his age as a negative factor in its decision.

Id. (emphasis in original).

On appeal, Schneider argued that the charge, to which he had objected, was illegal because it deprived the jury of the opportunity of finding Hormel liable based upon his presentation of a *prima facie* case and overwhelming proof of pretext. The charge limited the jury to a quest for direct proof of discrimination, which is the only other type of proof that could exist for discrimination absent the inference that arises from substantial proof of pretext. Despite the fact that the district court expressly found that Schneider had met all the elements of a *prima facie* case, and had presented a "substantial" enough case of discrimination to survive a directed verdict, the jury was unable to infer the existence of discrimination. The instruction that commanded it to return a verdict for Hormel absent evidence of "both" discrimination "and" pretext.

In a one-page *per curiam* opinion, the Fifth Circuit recognized the inherent problems in this instruction but nonetheless validated its result. In affirming the jury decision, the intermediate court held:

> We conclude that the charge could have been more specific in specifying that the jury could infer a discriminatory motive from a finding of pretext. Nothing in the charge, however, indicates that the jury was prohibited from drawing the inference. Neither the charge nor any of the

other rulings of the district court that are complained of constitute reversible error.

See App. 2.

ARGUMENT IN FAVOR OF ALLOWING THE WRIT

I. THE LOWER COURT'S RULING CONFLICTS WITH A PREVIOUS DECISION OF THIS COURT.

In 1993, this Court was called upon to resolve a split in the circuits as to what was required to prevail in discrimination cases. One line of cases required a plaintiff to show discrimination based on direct evidence – so-called "pretext-plus" circuits – and another line allowed a plaintiff to recover by showing only that an employer's proffered reasons for discharging the plaintiff were false – so-called "pretext-only" circuits. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 512 (1993). Brought under the very lenient burden of proof required by the Eight Circuit's "pretext-only rule," the plaintiff in *Hicks* had only been required to show "that all of the defendant's proffered reasons are not true reasons for the adverse employment action – then the plaintiff has satisfied his ultimate burden of persuasion." *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 493 (8th Cir. 1992). Once done, he could receive judgment as a matter of law. *Id.* This rule – prevalent in the District of Columbia, Second, Third, Fifth and Eighth Circuits – could not uniformly co-exist with the requirement in the remaining circuits that a plaintiff had to show *both* pretext and additional evidence of discrimination to recover under the 1990 Civil Rights Act.

This Court resolved the disagreement between the intermediate courts by holding that a showing of pretext coupled with a *prima facie* case of discrimination would give rise to a permissive inference of discrimination:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . .

Hicks, supra, 509 U.S. at 511 (emphasis in original).

The charge given in this case is impossible to reconcile with this Court's holding in *Hicks*. It mandated that the jury determine whether Schneider proved "both" discrimination "and" pretext, an eloquent expression of the "pretext plus" rule that was expressly rejected by this Court in *Hicks*.

While recognizing the essential invalidity of the charge, the Fifth Circuit nonetheless opined that "nothing in the charge, however, indicates that a jury was prohibited from drawing that inference." This attempt to square the charge with *Hicks* is, with all due respect, simply wrong.

Contrary to the Fifth Circuit's conclusion, the charge at issue expressly told the jury that it could not infer discrimination from pretext. It stated that evidence of both pretext and discrimination had to be presented. The jury was thus instructed to search for two separate and distinct elements, **both** of which had to be found in order

for it to return a verdict for Schneider. If the jury concluded that it could infer discrimination from pretext, as the Fifth Circuit deduced in its affirmance, then the jury disobeyed the charge it was given. It is precisely to eliminate this kind of "second guessing" of the jury's ultimate reason for decision that this Court in *Hicks* emphasized the importance of an accurate charge. Such a charge must inform the jury that it is allowed to infer discrimination from pretext, and that a plaintiff can recover without direct proof of discrimination:

> Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review.

Hicks, supra, 509 U.S. at 524. *See also*, 9A Wright & Miller, *Federal Practice & Procedure* § 2558 (1995) (instructions may not "confuse or mislead the jury with respect to the applicable principles of law").

What the Fifth Circuit masked in its statement that the instruction did not "prohibit" the drawing of the appropriate inference of discrimination is the *Schneider* opinion's effective rejection of the permissive pretext standard of *Hicks*. To allow a jury to utilize the permissive pretext standard, a court must inform it that the *prima facie* case coupled with evidence of pretext allows the jury to find for the plaintiff. An instruction which places any additional barrier between the two necessarily imposes a more onerous "pretext plus" burden of proof on a plaintiff attempting to prove discrimination. The district court's instruction in this case clearly imposed such a burden on Mr. Schneider.

II. *Hicks* has spawned a conflict in the circuits, a rift widened by the instant case.

Instead of a circuit split between "pretext plus" and "pretext only" circuits, a split currently exists between those circuits that follow *Hicks'* permissive pretext standard and those that still impose a pretext-plus burden on plaintiff recovery. *See* Davis, *The Stumbling Three Step, Burden Shifting Approach in Employment Discrimination Cases*, 61 Brook.L.Rev. 703, 726 (1995) ("*Hicks* has spurred continued division among federal courts."). The Fifth Circuit now sits on both sides of this fence, in that the instant decision contradicts a previous one which had expressly followed *Hicks'* repudiation of the 'pretext plus" rule. *Compare Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc). Accordingly, despite the clarity of *Hicks*, this Court needs to intervene once again to insure that all circuits, including the fractured Fifth Circuit, impose upon discrimination plaintiffs the same burden of proof.

Most circuits have explicitly recognized the dictates of *Hicks* and have stated that a plaintiff who shows both pretext and *prima facie* discrimination may recover. *See Kline v. TVA*, ___ F.3d ___, 1997 WL 631184, *11 (6th Cir. 1997) ("preceding case-law of this circuit has interpreted the *Hicks* decision as creating a permissive inference of discrimination following a rejection of the reasons offered by the defendant"); *Aka v. Wash. Hosp. Ctr.*, 116 F.3d 876, 881 (D.C.Cir.), *judgment vacated on other grounds*, 124 F.3d 1302 (D.C. Cir. 1997) (en banc) (finding summary judgment inappropriate where employee raises fact questions as to pretext, because "when presented with such

evidence, the factfinder may properly find for the plaintiff, and we have no power to snatch away from the factfinder crucial factual determinations that it is expressly permitted to make"); *EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 841 (6th Cir. 1996) ("the law allows a factfinder to infer intentional discrimination from proof of the prima facie case coupled with a disbelief of the proffered reason for the employer's action, but such an inference is not required"); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("the Supreme Court has said that discriminatory animus may be inferred from the simple showing of pretext"); *Jiminez v. Mary Washington College*, 57 F.3d 369, 378 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 380 (1995) ("under *St. Mary's*, the fact-finder's rejection of the legitimate, nondiscriminatory reason proffered by the defendant, coupled with the elements of the *prima facie* case, may permit the fact-finder to infer the ultimate fact of invidious discrimination with no additional proof of discrimination"). Indeed, prior to the instant case, the Fifth Circuit itself, in a closely-decided en banc opinion that reflected considerable disagreement on the issue by the full court, had expressly held that "[i]n tandem with a *prima facie* case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence." *Rhodes*, 75 F.3d at 994.

A minority of circuits, which the Fifth Circuit has now joined, continues to impose on discrimination plaintiffs the old "pretext plus" burden. *See Fisher v. Vassar College*, 114 F.3d 1332 (2nd Cir. 1997) (en banc); *Smith v. Stratus Computer, Inc.*, 40 F.3d 11 (1st Cir. 1994), *cert.*

denied, ___ U.S.___, 115 S.Ct. 1958 (1995). In *Fisher*, a discharged college professor convinced a jury that she had been discriminated against and that her employer's proffered reasons for discharging her were pretextual. *Id.* at 1334. On appeal, the original panel of the Second Circuit found her showing of pretext was not clearly erroneous, and it apparently found that she had shown *prima facie* evidence of discrimination. *Id.* Nonetheless, the panel reversed and the entire court reheard the case *en banc*.

In a fractured opinion, with two justices writing the plurality, five judges separately concurring, and the remaining judges dissenting, the Court *en banc* upheld the panel's reversal. While it based its holding on the notion that a district court finding of discrimination had to be subject to clear error review, its ultimate holding rested on the premise that "even if we find that the plaintiff has made out a *prima facie* case and has shown pretext, we still must review a trial court's determination that the defendant intentionally discriminated for clear error." *Id.* at 1340.

This holding separates the inquiry into discrimination from the inquiry into pretext, insisting that the plaintiff present independent evidence in addition to the traditional *McDonnell Douglas-Burdine* criteria to establish a legally sustainable verdict. As Chief Judge Newman – joined by Judges Kearse, Winter and Cabranes – noted, this requirement "is completely at odds" with the *Hicks* language to the effect that a factfinder may infer discrimination from the prima facie case and proof of pretext. *Id.* at 1375 (Newman C.J., dissenting). It effectively reads out this possibility in favor of a requirement that a plaintiff

must meet the three prongs of the *Hicks* analysis *and* show some direct evidence of discrimination in order to prevail. *See also Smith v. Stratus Computer, Inc., supra,* 40 F.3d at 11; *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994) (holding that the court could eliminate some cases at the summary judgment phase where it did not find the inference created by the *prima facie* case and proof of pretext compelling). The decision below is reflective of the *Fisher* and *Woods* approach, despite its utter irreconcilability with *Hicks* and the Fifth Circuit's earlier decision in *Rhodes*.

The intra-circuit conflict within the Fifth Circuit between the decision below and *Rhodes* is but a reflection of the inter-circuit split between the "pretext plus" analysis *of Fisher* and *Stratus Sys.* and the "permissive pretext" standard present in those circuits choosing to follow *Hicks*. This divergence places the Court in the same dilemma which compelled it to grant certiorari in *Hicks*. To complete the evolution of the permissive pretext rule and to further guide district courts in applying that rule, the Court should grant a writ of certiorari in this case and review the decisions below.

III. Faithful adherence to the *Hicks* rule is necessary to satisfy Congressional intent.

Because of the insipid nature of discriminatory practices, this Court has relieved plaintiffs in discrimination cases from having to show direct evidence of discrimination. "The distinct method of proof in employment discrimination cases, relying on presumptions and shifting burdens of articulation and production, arose out of the

Supreme Court's recognition that direct evidence of an employer's motivation will often be unavailable or difficult to acquire." *Sheridan v. E.I. DuPont de Nemours*, 100 F.3rd 1061, 1071 (3rd Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2532 (1997). Because so few employers memorialize their discriminatory motives in ways that are readily apparent, it is indeed a rare case which allows an employment discrimination plaintiff to present direct evidence of discrimination. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). To allow such subtle discrimination to go unchecked would sidestep Congress' recognition that "Title VII tolerates no [] discrimination, subtle or otherwise." *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). *See also* 137 Cong.Rec. H3857-01 (Statement of Rep. Hughes) (Stating his disbelief that "we should tolerate a little discrimination and thereby make our country a land of partially equal opportunity for all"); 137 Cong.Rec. H9505-01 (Statement of Rep. Stokes) ("This bill makes it clear that employment decisions motivated by prejudice are illegal"). It would further eviscerate the similar social policy which led to the passage of the ADEA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991).

A standard of proof which requires a discharged employee to demonstrate direct evidence of discrimination stands in direct contradistinction to the principles underlying the ADEA and Title VII. As candidly admitted by the Sixth Circuit, which previous to *Hicks* followed a pretext plus standard, that onerous standard requires that a "plaintiff must not only demonstrate that the employer's asserted reasons were pretextual, but the

plaintiff also must introduce additional evidence of discrimination. Only with an indirect and direct showing of discrimination is the plaintiff entitled to judgment as a matter of law." *Kline*, 1997 WL 631184 at *6. In order to prevail on his claim in a pretext plus circuit, a plaintiff must "produce direct evidence in addition to proof of pretext in order to prevail on his claim." *Id.* at *7 (citing *Gagne v. Northwestern Ins. Co.*, 881 F.2d 309, 314 (6th Cir.1989)). Consequently, the plaintiff must prove that which he is not as a practical matter in any position to prove. Courts imposing a "pretext plus" standard of proof on the plaintiff ignore this reality by consciously requiring the production of direct evidence of discrimination and rendering adequate relief virtually impossible.

Such courts further encourage employers to foment their prejudices and then to lie about the effect of that prejudice. This perverse encouragement of concealment runs directly contrary to the spirit of the anti-discrimination jurisprudence expressed in *McDonnell Douglas*, *Burdine*, and *Hicks*:

> There is simply no justification for favoring these employers by exempting them from responsibility for lies. It may indeed be true that such employers have nondiscriminatory reasons for their actions, but ones so shameful that they wish to conceal them. One can understand human frailty and the natural desire to conceal it, however, without finding a justification to dispense with an orderly procedure for getting at the "elusive factual question of intentional discrimination."

Hicks, 509 U.S. at 537 (Souter J., dissenting).

IV. The instant case presents a good vehicle to complete the work begun by this Court in *Hicks*.

As demonstrated above, the good and valuable work begun by this court in *Hicks* is not yet complete. The lower courts are still in need of instruction on the proper burden of proof that is to be borne by discrimination plaintiffs.

While the instant unreported *per curiam* opinion would initially appear not to offer this Court a good choice to continue its mission, one distinguishing feature of this case makes it an appropriate vehicle. Unlike most discrimination cases in which the plaintiff is dismissed at the summary judgment stage, and thus lacks an opportunity to present his *prima facie* case to a jury, the district court in this case expressly found that Schneider had established a *prima facie* case of age discrimination, and denied a directed verdict. Thus, this is a case where there was sufficient evidence to survive dismissal as a matter of law, but an erroneous instruction interdicted the jury's fact-finding mission. Faced with a case in this procedural posture, this Court can focus on the degree of discretion to be afforded to juries in discrimination cases once it has been found as a matter of law that the case is one which presents substantial enough evidence to be given to the jury.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court grant its *Petition for a Writ of Certiorari* to reverse the decision of the Fifth Circuit Court of Appeals, which impermissibly imposed a "pretext plus" burden of proof on Mr. Schneider's employment discrimination claims.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30408

KURT M. SCHNEIDER,

Plaintiff-Appellant,

VERSUS

GEORGE A. HORMEL & CO., ALAN RASELL,
and
HORMEL FOODS CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(93-CV-1264"L")

Before JOLLY, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:*

Kurt Schneider appeals an adverse jury verdict on his claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* We have reviewed the briefs submitted on appeal and applicable portions of the record and have heard the oral arguments of counsel. The

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

primary issue appears to be whether the jury charge reversibly failed to instruct that the jury could infer discrimination from the plaintiff's proof of the *prima facie* case and pretext.

We conclude that the charge could have been more specific in specifying that the jury could infer a discriminatory motive from a finding of pretext. Nothing in the charge, however, indicates that the jury was prohibited from drawing that inference. Neither the charge nor any of the other rulings of the district court that are complained of constitute reversible error.

The judgment, accordingly, is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KURT M. SCHNEIDER	CIVIL ACTION
VERSUS	NO. 93-1264
GEO. A. HORMEL & COMPANY ET AL	SECTION: L

AMENDED JUDGMENT

Considering the Court's Order entered herein on February 5, 1996, accordingly:

This matter came on before the Court for trial by jury on previous days. Now therefore, considering the prior dismissal of defendant, Alan Rasell, the answers of the jury to the interrogatories propounded to them, and the direction of the Court as to the entry of judgment, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Hormel Foods Corporation (Geo. A. Hormel & Company), and Alan Rasell, and against plaintiff, Kurt M. Schneider, dismissing said plaintiff's complaint with prejudice.

Costs are hereby taxed against said plaintiff and are to be paid to said defendant.

New Orleans, Louisiana, this ___(14)___ day of February, 1996.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KURT M. SCHNEIDER	CIVIL ACTION
VERSUS	NO. 93-1264
GEO. A. HORMEL & COMPANY ET AL	SECTION: L

JUDGMENT

This matter came on before the Court for trial by jury on previous days. Now therefore, considering the prior dismissal of defendant, Alan Rasell, the answers of the jury to the interrogatories propounded to them, and the direction of the Court as to the entry of judgment, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Hormel Foods Corporation (Geo. A. Hormel & Company), and Alan Rasell, and against plaintiff, Kurt M. Schneider, dismissing said plaintiff's complaint with prejudice.

Each party is to bear its own costs.

New Orleans, Louisiana, this ___(14)___ day of November, 1995.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KURT M. SCHNEIDER	CIVIL ACTION
VERSUS	NO. 93-1264
GEO. A. HORMEL & COMPANY ET AL	SECTION: L

ORDER

Before the Court is defendant's motion to amend judgment. After a two-week jury trial, a verdict was returned in favor of the defendant. A judgment was then entered confirming the jury verdict on November 15, 1995 which stated that "Each party is to bear its own costs." The defendant's motion to amend judgment asks this Court to amend the final judgment to say that costs are to be taxed against the plaintiff and paid to the defendant.

Federal Rule of Civil Procedure 54(d) states that "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs." The decision regarding costs is left to the discretion of the district court but Rule 54(d) creates a strong presumption that the prevailing party will be awarded costs. *Schwarz v. Folloder*, 767 F.2d 125, 131 (5th Cir. 1985) and *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). Additionally, this presumption has created the rule that a district court may not disallow a prevailing party's bill of costs without articulating reasons. *Schwarz v. Folloder, supra* and *In re Two Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, 994 F.2d 956, 962-3 (1st Cir. 1993). The rule has developed such that the prevailing party is prima facie entitled to costs and the losing

party bears the burden of overcoming this presumption. *First Commonwealth v. Hibernia Bank,* 891 F.Supp. 290, 301 (E.D. La. 1995).

Applying these principles to this motion, the Court finds that the defendant is entitled to recover costs in this matter as the prevailing party. Therefore,

IT IS HEREBY ORDERED that the defendant's motion to amend judgment is GRANTED and that the judgment be amended to reflect that costs are to be taxed against plaintiff and to be paid to defendant. The clerk is directed to tax those costs appropriate pursuant to 28 U.S.C. §1920.

FURTHERMORE, it is hereby ordered that the hearing set for February 7, 1996 on the defendant's motion to amend judgment is CANCELLED.

New Orleans, Louisiana, this ___(1)___ day of February.

UNITED STATES DISTRICT JUDGE

RELEVANT JURY INSTRUCTIONS

In this case the plaintiff, Kurt M. Schneider, has sued the defendant, Hormel Foods Corporation, alleging discrimination under the Age Discrimination in Employment Act. This Act makes it unlawful for an employer to discharge an employee above the age of 40 because of that employee's age.

The plaintiff claims that the defendant discriminated against him by discharging him because of his age. Now, in order for the plaintiff to recover on his age discrimination claim, he must demonstrate:

(1) That he was above the age of 40;

(2) That he was discharged;

(3) That he was qualified for the position; and

(4) That his age was a determinative factor in the defendant's decision to discharge him.

* * *

The plaintiff, Kurt M. Schneider, must prove both that the reason given by the defendant, Hormel Foods Corporation, for discharging him is false or should not be believed and that the true reason he was selected for discharge is due to age discrimination; that the defendant discharged him because of his age or regarded his age as a negative factor in its decision.